No. 85-1716

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JEAN E. WELCH,
Petitioner,

v.

STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION AND THE STATE OF TEXAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a United States district court has jurisdiction to entertain a Jones Act suit against the State of Texas in light of the jurisdictional limitations on suits against the States implicit in Article III, as confirmed by the Eleventh Amendment.

2. Whether the State of Texas has consented to a Jones Act suit in the federal court.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case poses a direct assault on one of the foundations of our system of federalism: the constitutional limitation on the federal judicial power to assert jurisdiction over private suits against the States. This limitation on the federal courts' Article III power, confirmed by the Eleventh Amendment, reflects the original

understanding that if the States are to be subject to private suit, they are entitled to have those suits maintained in their own courts, rather than the federal courts.

The issue here is not *Congress'* admiralty or maritime power, or its authority under the Commerce Clause, to regulate the employment of seamen by the States. The issue is purely and simply one of jurisdiction: the assertion of the federal *judicial* power over one of the sovereign States without its consent.

Amici believe that petitioner's assumption that only the federal courts can afford her an adequate remedy is an affront to the integrity of the States' own judicial systems. As this Court underscored only recently, it "denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3146 n.2 (1985). The state courts are fully empowered to hear Jones Act suits. To invoke the rhetoric of "a right without a remedy" thus improperly deflects the debate from its appropriate focus: whether an individual may hale an unwilling State into federal court to account for a personal injury claim.

Amici submit that the decision below is correct. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This case presents the question whether the Eleventh Amendment precludes a federal court from assuming jurisdiction over a Jones Act claim brought against the State of Texas by one of its citizens. Petitioner Jean

[1] Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

Welch is an employee of the Texas Department of Highways, which operates a free passenger ferry between Point Bolivar and Galveston, Texas. Ms. Welch was injured in the course of her duties as a marine technician on the ferry landing dock at Galveston. Although entitled to workers' compensation benefits under state law, petitioner instead brought this action in federal court against the State of Texas and its Department of Highways and Public Transportation pursuant to the Jones Act, 46 U.S.C. § 688.

The district court dismissed the suit because it determined that both defendants were immune from suit under the Eleventh Amendment. On appeal, the United States Court of Appeals for the Fifth Circuit reversed. 739 F.2d 1034 (1984). Sitting *en banc*, the Fifth Circuit on rehearing set aside the panel's judgment and affirmed the district court's dismissal. 780 F.2d 1268 (1986).

SUMMARY OF ARGUMENT

Federal district courts do not possess Article III jurisdiction to entertain a private suit against a State. For this reason, the district court below was without jurisdiction over this Jones Act claim against the State of Texas. Congress has no power to override that constitutional limitation. This case thus presents no occasion for determining any question of congressional intention, or power, to regulate the States. This Court should affirm the dismissal below without consideration of the merits, including the issue whether a State is, or permissibly might be, subject to Jones Act liability.

The Eleventh Amendment clarifies the Framers' understanding that Article III does not extend federal jurisdiction to citizen and alien suits against the States. The principal purpose of the Amendment was to protect the States from being called to account in the courts of a "higher sovereign," the United States, and the Amend-

ment reflects the Framers' concern for the continued sovereignty of the States in a National government.

But to say that the Eleventh Amendment reflects concern for state sovereignty is not to say that it embodies the doctrine of sovereign immunity as it existed at common law. Absolute state sovereign immunity is not compatible with a constitutional structure in which the States surrendered a portion of their sovereignty and voluntarily submitted their law to an overriding federal law. The proponents of the Amendment, reflecting the popular sentiment at the time of the framing of the Constitution itself, did not attempt to upset the principle of federal supremacy. The Eleventh Amendment reflects a more discrete, but more emphatic, limitation on federal authority than would any attempt to inject the substantive doctrine of state sovereign immunity into the Constitution. It defines a firm limitation on the *jurisdiction* of the federal *courts*, which possess only the jurisdiction that the Constitution affirmatively grants and no more. However much the States agreed to submit themselves to federal *legislative* authority under the new constitutional scheme, the history of the Eleventh Amendment teaches that the States did not also agree to submit to the indignity of being called to account as ordinary litigants in the federal courts by individual suitors.

The analysis employed by the court below tended to confuse the initial jurisdictional inquiry with the various substantive law issues raised when Congress enacts a regulatory scheme facially broad enough to encompass the States. That confusion mirrors a mode of analysis first employed in *Parden v. Terminal Railway*, 377 U.S. 184 (1964), where, in contrast to this Court's more careful recent explications of the Eleventh Amendment, the Court tended to view the Amendment as the embodiment of the common law doctrine of sovereign immunity, rather than as a jurisdictional bar to suit. Thus, the *Parden* opinion failed adequately to differentiate between the *substantive* issue of Congress' power to create a cause of action against a State and the *jurisdictional* question whether such a cause of action, once created, could be pursued against a State in a *federal court*. This admixture provided the foundation for *Parden*'s expansive approach to State "consent."

Amici urge this Court to reject that expansive view as inconsistent with the jurisdictional premises underlying Article III, and to hold that there is no federal jurisdiction over the petitioner's claim against the State of Texas. Although a State may give its consent to be sued in a federal court, such consent is not to be readily implied. Because the State of Texas has not consented to federal court jurisdiction under the Jones Act, the Eleventh Amendment bar is fully operative in this case. The Court should leave for another day the question whether the Jones Act authorizes suit against a State. The state courts are fully qualified to answer this question in the first instance.[2]

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[2] In this brief, *amici* argue that the Eleventh Amendment proscribes private suits against unwilling States in federal court as a matter of *constitutional* law. Even were this Court to conclude otherwise, there are two related *statutory* bases for affirming the lower court's decision in this case. Because of the States' special role in our federal system, Congress is obliged unequivocally to express its intention any time that it seeks to (1) subject a State to federal court jurisdiction or (2) subject a State to liability.

Here, neither plain statement requirement has been met. *First*, we submit that there has been no direct, express indication by Congress in the Jones Act to hold a State liable to suit in federal court. The Jones Act itself contains no separate jurisdictional provision, but merely one of venue. *See Panama R.R. v. Johnson*, 264 U.S. 375, 384-85 (1924). And neither the grant of general federal question jurisdiction nor admiralty jurisdiction should be read specifically to encompass this type of suit against a State. *Second*, as the State of Texas persuasively argues in its brief, because there is no clear indication in the Jones Act or its legislative history that Congress intended to subject the States to liability under the statute, it must be held not to apply here.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER PETITIONER'S JONES ACT CLAIM AGAINST THE STATE OF TEXAS.

A. The Eleventh Amendment Reflects A Jurisdictional Limitation On The Power Of Federal Courts To Entertain Private Suits Against States.

The Eleventh Amendment is an express limitation on the federal judicial power,[3] barring federal courts from exercising that power in suits brought by private citizens against a State. While the Amendment reflects the same respect for state sovereignty that underlies ancient principles of sovereign immunity, it does not incorporate that common law doctrine. Indeed, it makes no reference to sovereign immunity in any form. Rather, the Amendment speaks in the emphatic language of jurisdiction, defining, or refining, the limited delegation of power to the federal courts under Article III.

The story of the Eleventh Amendment's emergence as a reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), has been often told. *Chisholm* involved an action brought by a South Carolina citizen against the State of Georgia pursuant to Article III's grant of jurisdiction over "Controversies . . . between a State and Citizens of another State . . . ." The Court found jurisdiction, holding that the State's claim that it could not be made an involuntary defendant in federal court was belied by the express language of Article III. The decision in *Chisholm*, only four years after the ratification of the Constitution, "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco v. Mississippi*, 292 U.S. 313, 325

[3] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

U.S. Const. Amend. XI.

(1934). The Nation's response when *Chisholm* came down—and the pervasive sense that it somehow upset the States' role in the constitutional plan—is difficult to square with a narrow, technical reading of the purpose behind the Eleventh Amendment. Although there has been much discussion about the precise scope of the Amendment,[4] all agree that its aim was to overturn *Chisholm*.[5]

The fact that the Eleventh Amendment grew out of a controversy over the scope of Article III's grant of federal judicial power is crucial to a proper understanding of the Amendment. Prior to the ratification of the Constitution, the provision in Section 2 of Article III concerning "Controversies . . . between a State and Citizens of another State," despite its plain language, was understood and explained by many as *not* encompassing private suits in which States were made unwilling defendants in federal court. *See Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 292 (1973) (Marshall, J., concurring); *The Federalist* No. 81 (A. Hamilton); 1 C. Warren, *The Supreme Court in United States History* 91 (rev. ed.

[4] *See Atascadero*, 105 S. Ct. 3142, 3150-78 (Brennan, J., dissenting); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515 (1978); Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983).

[5] One major newspaper proclaimed that the decision would lead to the overthrow of the State governments and to the "downfall of liberty and the subversion of the rights of the people. . . ." 1 C. Warren, *The Supreme Court in United States History* 97 (2d ed. 1926). Indeed, the Georgia House of Representatives became so excited that it passed a bill providing that anyone attempting to execute process in the *Chisholm* case should be declared "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." *Id.* at 100. Although the Framers can be read both ways on the question whether, under the original Document, States could be made subject to suit in federal court, the reaction engendered by *Chisholm* suggests that, Framers aside, *Chisholm* was not what they, the populace and the ratifying States, had in mind.

1937). It was this understanding that *Chisholm* challenged and that the Eleventh Amendment's speedy ratification served to restore. This swift reaction by the same population that approved the Constitution suggests a clarifying purpose: *i.e.*, that the Court in *Chisholm* misconstrued the language of Article III, necessitating the corrective action of the Eleventh Amendment to prohibit that construction and restore the original understanding. *See Employees*, 411 U.S. at 292 (Marshall, J., concurring).

Consistent with this view, this Court, in *Hans v. Louisiana*, 134 U.S. 1 (1890), found in the Eleventh Amendment the confirmation of a broader, pre-existing jurisdictional limitation. By its literal terms, the Eleventh Amendment forbids federal jurisdiction only over suits against a State by "Citizens of another State, or by Citizens or Subjects of any Foreign State." It makes no mention of suits brought against a State by one of its own citizens. The historical explanation for this, suggested by *Hans*, is straightforward: the Eleventh Amendment dealt with the only situation in which the Constitution *by its express terms* had suggested that a State could be subject to federal court suit. Although there was much concern with the only explicit grant of jurisdiction over cases against States, few persons even considered the possibility that a State could be sued in federal court by its own citizens under the federal question clause. *See* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 110 (1972). Thus, the Court in *Hans* read the limitations on the federal judicial power exemplified by the Eleventh Amendment as applying with equal force to suits brought against a State by one of its own citizens.[6] 134 U.S. at 14-15. *Hans* stands for the straightforward proposition that under our federal system

[6] To read it otherwise would have resulted in the curious anomaly that citizens of a State would have had a federal judicial remedy against their own State which, by virtue of the Eleventh Amendment, was denied to citizens of other States and to aliens. *See* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 110 (1972).

a State is not an ordinary litigant; whatever else the States may have contemplated in surrendering some portion of their sovereignty to the federal union, they did not unblinkingly accept that they were thereby subjecting themselves to suit by individuals in federal court.

This Court's cases have, with only slight deviation,[7] likewise described the Amendment and *Hans* in terms of the simple jurisdictional statement that the constitutional grant of authority to the federal courts did not contemplate any form of suit by individuals against unwilling States. *See, e.g., Atascadero*, 105 S. Ct. at 3145; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98-99 (1984); *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *Monaco v. Mississippi*, 292 U.S. at 329; *Missouri v. Fiske*, 290 U.S. 18, 25-26 (1933). Thus, in *Ex Parte State of New York, No. 1*, 256 U.S. 490 (1921), the Court explained:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court *that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Id. at 497 (emphasis added) (citations omitted).

Developing this understanding, this Court in *Pennhurst* described the Eleventh Amendment as "a constitutional limitation on the federal judicial power" which "deprives federal courts of any jurisdiction" to entertain claims

[7] *See Parden v. Terminal Railway*, 377 U.S. 184 (1964), discussed *infra* at 21-28.

against a State by either its citizens or those of another state. 465 U.S. at 98-99 & 99 n.8. "The Amendment thus is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts." *Id.* at 120; *see also Kentucky v. Graham*, 105 S. Ct. 3099, 3106 n.4 (1985). This understanding is further reflected in this Court's recognition that, as an issue of jurisdiction, an Eleventh Amendment claim may be raised at any point in a proceeding: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that the Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Pennhurst*, 465 U.S. at 99 n.8, *quoting Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945). *See also Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974).

B. The Eleventh Amendment Is Not A Literal Embodiment Of The Sovereign Immunity Doctrine.

Although *Hans* is best understood, and has long been read by this Court, in these simple jurisdictional terms, its repeated references to sovereign immunity as the historical wellspring of its holding seem to have led to considerable controversy in this Court's recent Eleventh Amendment jurisprudence. *Amici* are mindful that four members of this Court have recently subjected *Hans* to a serious and lengthy critique, suggesting that *Hans* misconstrued the historical record, or that later cases have misconstrued *Hans*. *See generally Atascadero*, 105 S. Ct. at 3150-80 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting). The critique mistakenly focuses, we think, on the strawman of sovereign immunity rather than the simple jurisdictional principle that is at the heart of the Amendment and *Hans*. Considerations of both history and logic cast doubt on the viability of this revisionist view.

In essence, this revisionist critique seeks a narrow reading of the Amendment as providing protection for state sovereign immunity in only those state law suits that come to the courts under the diversity clauses; conversely, it views the Eleventh Amendment as having no application to federal question cases. This interpretation is premised largely on the fact that the Amendment was adopted in reaction to *Chisholm*, a diversity case in which the State's claim of sovereign immunity was given short shrift. As the critique goes, federal question cases, by their nature, involve a supervening federal authority against which the state law defense of sovereign immunity can afford no logical bar. Thus, the critique draws historical support from the views of some of the Framers and draws its conceptual basis from the supremacy of federal law. Neither rationale, however, carries sufficient force to cast serious doubt on this Court's current view of the Eleventh Amendment and its origins.

1. *A narrow view of the Eleventh Amendment fails convincingly to account for the swift and decisive reaction to* Chisholm.

The speed with which the States acted to overturn *Chisholm* suggests that something about that decision was fundamentally at odds with the widespread understanding of the Constitution ratified only four years before.[8]

[8] It must be emphasized that although the Eleventh Amendment was clearly aimed at overturning the *result* in *Chisholm*, as everyone seems to agree, it was probably not a direct response to the Court's opinion or a specific endorsement of Justice Iredell's dissent. It is doubtful that either the proponents of the Amendment or the state legislatures that ratified it had ready access to the Court's opinion, much less were familiar with it. *See* Baker, *Federalism and the Eleventh Amendment*, 48 U. Colo. L. Rev. 139, 144 (1977). Dallas' official report of *Chisholm* was not published until after Congress and the necessary number of States had acted to overturn the case; and although the Clerk of the Court did issue a summary of opinions to the press, *Chisholm*'s summary was not issued until the day after the Eleventh Amendment was introduced. *Id.* at 144 n.29, *citing* 1 C. Warren, *The Supreme Court in United States History* 94 n.1 (1922).

To read this swift reaction as reflecting nothing more than a desire to effect a technical revision of the diversity clauses places far too fine a point on the views of certain contemporaneous commentators and disregards the Eleventh Amendment's broader historical context.[9]

The Nation's reaction to *Chisholm* may, in part at least, be rooted in a sense of betrayal. At the time of the Constitution's ratification, many States were troubled that Section 2 of Article III could be read to allow an individual to sue a State in federal court and, on this basis alone, several States were prepared to vote against ratification.[10] Some States were so concerned that they proposed amendments that would clarify in no uncertain terms that nothing in the Constitution could "be construed to authorize any suit to be brought against any state, in any matter whatever." *See* 2 *Elliott's Debates* 409 (submitted to the First Congress by the New York Convention). Ultimately, however, it was the forceful political advocacy of Federalists Hamilton, Madison, and Marshall that allayed these fears by stressing unequivocally that the Clause could not legitimately be read to authorize private suits against the States in the federal

[9] The visceral reaction to *Chisholm*, following so closely upon the ratification of the Constitution itself, may speak more eloquently on the intended scope of Article III than the statements of one or another Founding Father. The difficulties of attributing some single purpose or intention to the proponents of the Constitution to guide the interpretation of that Document are well known. *See, e.g.*, J. Ely, *Democracy and Distrust* 1-41 (1980). The voices of the Framers are not always in accord, and the concerns of the States that ratified the Document, and of the populace whose collective will is presumably reflected in it, are many and varied. *See id.* at 17.

[10] *See* 3 J. Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 319, 475-76, 543 (2d ed. 1836) (statements of Patrick Henry) [hereinafter cited as *Elliott's Debates*]; *id.* at 527 (statement of George Mason); *Pamphlets on the Constitution of the United States* 309 (P. Ford ed. 1888) (statement of Richard Henry Lee).

courts.[11] Professor Warren is surely right that it was this Federalist assurance that provided one of the final catalysts for the ratification of the Constitution. 1 C. Warren, *The Supreme Court in United States History* 91 (2d ed. 1926). Only four years later, *Chisholm* rendered that assurance a mockery.[12]

[11] For example, Madison responded to Patrick Henry's worries by insisting that under the new Constitution, "[i]t is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring suit against a citizen, it must be brought before the federal court." 3 *Elliott's Debates* 533. Hamilton similarly assured the States that

> [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

The Federalist No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961).

[12] This was aptly expressed by an editorial that appeared in Boston's *Independent Chronicle:*

> [*Chisholm*'s] novelty is not less striking than the importance of the consequences which may result from an acquiescence in this stride of authority. . . . When the persons in opposition to the acceptance of the new Constitution hinged on the Article respecting the power of the Judiciary Department being so very extensive and alarming as to comprehend even the State itself as a party to an action of debt, this was denied peremptorily by the Federalists as an absurdity in terms. But it is now said that the eloquent and profound reasoning of the Chief Justice has made that to be right which was, at first, doubtful or improper.

(*quoted* in 1 C. Warren, *The Supreme Court in United States History* 96 (2d ed. 1926)).

Put simply, the lesson of *Chisholm* is that the sophisticated analysis of a majority of this Court, only four years after the Constitution's ratification, failed to reflect the pronounced sentiments of the people about the meaning of the Document that they had ratified. For those who reacted to *Chisholm*, the thought that the States could be brought to heel in the federal courts at the whim of an individual suitor was simply intolerable. The notion raised a host of conceptual and practical problems that they had never intended to import into the constitutional scheme. In particular, there was the vexing question of how a federal court judgment would be enforced against a State, a concern referred to repeatedly in the ratification debates.[13] *See, e.g.*, 3 *Elliott's Debates* 526-27 (statement of George Mason); *The Federalist* No. 81, at 511-12 (A. Hamilton) (B. Wright ed. 1961). These comments serve to emphasize that it was difficult for many people to envision the States as ordinary litigants in the federal courts or to believe that the Constitution had impliedly reduced the States to that status.

The jarring notion of unwilling States' being haled by individuals before the federal courts would appear to have little to do with what "head of jurisdiction" the case had been brought under. To be sure, there was little discussion or concern with the question whether the States could be made subject to federal court suit on a federal claim. But that silence cannot be taken as acceptance of the proposition that the States could be made subject to suit in those circumstances. The Amendment addressed the immediate concern raised by *Chisholm* and focused on the only situation in which the possibility of suit against a State had been *expressly* mentioned in the Constitution. Although the historical record is probably too sparse to be decisive, the fact that the few documents of the Eleventh Amendment's day failed to recognize explicitly the possibility of suit against a State on a federal claim, and to distinguish it from the diversity context, suggests that such a suit would have been viewed as equally improbable.[14]

Hans, we think, correctly discerned that a reservation against such suits was implicit in Article III and that Article III did not contemplate that an unwilling State

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[13] George Mason, speaking at the Virginia convention, protested:

> Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject further. What is to be done if a judgment be obtained against a state? Will you issue a *fieri facias*? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.

3 *Elliott's Debates* 527.

[14] *Amicus* AFL-CIO makes much of the "alternative holding" of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), suggesting that one of the reasons that this Court has jurisdiction to review federal questions on appeal from state court judgments, despite the Eleventh Amendment, is because the federal courts possess jurisdiction over federal claims without regard to the parties, and that jurisdiction is unaffected by the Eleventh Amendment. Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* Supporting Petitioner, at 16-19, 22-23.

Cohens' primary rationale, drawing a distinction between suits initiated in the lower federal courts and matters that reach this Court on review, is better reasoned: the Eleventh Amendment is no bar to Supreme Court judisdiction because a writ of error to the Supreme Court is not a "suit" within the meaning of the Amendment. That narrower rationale better reflects the constitutional plan. As Justice Holmes once explained, there would be little harm to the Union if the lower federal courts could not entertain federal question suits against a State in the first instance; for the state courts are always available to adjudicate federal claims. The Union might be imperiled, however, if this Court did not have judisdiction to review state court judgments and the States were free to apply and develop their own idea of federal law without restraint. *See* O. Holmes, *Collected Legal Papers* 295-96 (1920).

Indeed, at the heart of *Cohens* is the notion that the state courts play a significant role as the first-line adjudicators of federal rights.

qua State could be sued as an ordinary litigant in the federal courts; such a suit was beyond the reach of the federal courts' assigned jurisdiction, as commonly understood. *Amici* believe that the *Hans* Court correctly gleaned that understanding from the Nation's dramatic reaction to the contrary decision in *Chisholm*.

2. *The Eleventh Amendment did not import sovereign immunity into the Constitution.*

On occasion the proponents, but more frequently the detractors, of *Hans* have put forward the view that the Eleventh Amendment merely reaffirmed the doctrine of state sovereign immunity, giving it some constitutional significance. For the proponents of a broad prohibition on federal suits against the States, the references to sovereign immunity have served to provide an ancient authority for their interpretation. For the limiters of the Eleventh Amendment, however, these same references have revealed a fundamental flaw in the attempt to extend Eleventh Amendment principles to federal question cases—one that appears to strike at the heart of federal supremacy. Although the opinion in *Hans* is less than perspicuous, *amici* believe that the Court in that case made no attempt to read into the Constitution any form of sovereign immunity. To incorporate the doctrine of sovereign immunity into the Constitution, whether for a federal or a state claim, would have been inconsistent with certain basic constitutional premises.[15]

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[15] Indeed, it was widely understood at the time of ratification that, as a practical matter, sovereign immunity was virtually a dead letter. So rarely was the doctrine invoked at common law that its continued existence could legitimately be subject to question. *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1895-99 (1983). As Judge Gibbons explains, the history of late 18th century America dispels the notion that governmental immunity was an accepted doctrine at the time. *Id.* at 1896. Thus, if the reaction to *Chisholm* and adoption of the Eleventh Amendment are to be understood as the reflection of popular sentiment, it is hard to believe that popular sentiment could be so swiftly mobilized around a theme as unpopular as the reaffirmation of sovereign immunity. *Ibid.*

First, the common law doctrine of sovereign immunity would have been a difficult idea to accommodate within the structure of the federal system. Fundamental to the constitutional scheme was the understanding that the Federal Government was the "higher sovereign" within its designated sphere of authority. Although the analogy is imperfect, for the States to assert the defense of sovereign immunity in the courts of that higher sovereign, the United States, would likely have been viewed as akin to a lord laying claim to sovereign immunity in the courts of the king. *See Nevada v. Hall*, 440 U.S. 410, 418 (1979). In short, the notion of the supreme Union precludes the idea that a State could claim a special immunity to a federal law claim. Indeed, it apparently never occurred to the majority in *Chisholm* that Georgia could be sued in federal court but still assert sovereign immunity as a defense to the claim.

Second, it was well understood that the federal courts possessed only the limited jurisdiction conveyed by the Constitution (and the even narrower jurisdiction statutorily assigned by Congress). The Framers perceived the federal government in general, and the federal courts in particular, as possessing only the limited powers that were expressly assigned to them. The Eleventh Amendment filled the only apparent crack in the wall—a crack caused by the seemingly plain language of Article III—against allowing a suit against a State to proceed in federal court. It did so by employing jurisdictional language. If that Amendment exemplified some larger principle, that principle was not "sovereign immunity," a substantive defense to certain claims, but rather an understanding of a limited judiciary Article of the Constitution under which the States would not be treated as ordinary defendants in federal court suits.[16]

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[16] We can assume that if the proponents of the Amendment merely wanted to import state sovereign immunity into the Con-

In short, quite apart from the history of the Amendment, the logic of the Constitution commends that *Hans* be understood as describing a jurisdictional exclusion to the otherwise broad reach of Article III.

3. *The Eleventh Amendment does not restrict Congress' substantive lawmaking authority.*

Just as it is a mistake to view *Hans* and its progeny as involving a "general expansion of a constitutional sovereign immunity doctrine," *Atascadero*, 105 S. Ct. at 3178 (Brennan, J., dissenting), it is also a mistake to view *Hans* as "limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority." *Ibid.* *Hans* does not "impose substantive limits on [Congress'] lawmaking authority" (105 S.Ct. at 3172), nor does it suggest a limitation irreconcilable "with any principled view of congressional power." *Id.* at 3178-79 (Blackmun, J., dissenting).

On the contrary, *Hans* simply restricts the power of the lower federal courts, without imposing any limits on Congress' lawmaking authority. That authority does not rest on state submission to the jurisdiction of the federal courts, but upon federal legislative primacy under the Supremacy Clause. The Supremacy Clause establishes the basic hierarchy of the federal system, by providing that the federal Constitution, laws, and treaties are "the supreme Law of the Land," and binding on "the Judges in every State." U.S. Const., Art. VI, cl. 2. Plainly, the Framers contemplated a substantial role for the courts of the individual States in the enforcement of federal law.[17] It denigrates those courts to suggest that

stitution, they would have chosen words to voice that sentiment directly, rather than speak in jurisdictional terms.

[17] For many years, the state courts were the primary guarantors of federal rights. The respective roles of the state and federal courts changed somewhat after the Civil War with the grant of civil rights and general federal question jurisdiction to the federal district courts. The federal courts thereupon came to be viewed

they cannot handle effectively suits brought under federal laws like the Jones Act.[18] *See Atascadero*, 105 S. Ct. at 3146 n.2; *Employees*, 411 U.S. at 298 (Marshall, J., concurring).

Moreover, it bears recalling that the joining of the sovereign States into the Federal Union, and the submission of the States to overriding federal law, was not without some resistance on the part of the States at the time of ratification. Although the States ultimately elected to surrender the most significant aspect of their sovereignty by subordinating their law to federal law, that surrender of sovereignty was not unqualified. The States joined a union in which they expected to maintain a special identity. The broad sweep of Article I, combined with the Supremacy Clause, has left little opportunity to identify and give effect to the residuum of independence retained by the States. But the adoption of the Eleventh Amendment does provide one clear, historically based expression of State resistance to federal overreaching. The States, in exchange for the compact among them, agreed to subordinate their laws to the laws of the Union. But it was no part of that exchange, and the States actively resisted, the indignity of being compelled to appear in the federal courts, at the whim of a private suitor, as ordinary defendants. The fundamental right of a State to have suits against it heard and determined in its own courts was, for many, implicit in the constitutional plan.

This understanding of the Eleventh Amendment—that it reinforces a preexisting jurisdictional limitation im-

as the primary protectors of individual rights. *See Mitchum v. Foster*, 407 U.S. 225, 241-42 (1972).

[18] State courts of general jurisdiction are fully competent to hear Jones Act suits (*see O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943); *Engel v. Davenport*, 271 U.S. 33, 37-38 (1926)), and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-44 (1816).

plicit in Article III—reduces much of the tension that has surrounded the debate about the scope of the Amendment. On the one hand, the jurisdictional nature of the Eleventh Amendment leaves it wholly immune from congressional abrogation; Congress cannot grant to the federal courts jurisdiction denied to those courts by Article III.[19] On the other hand, the declaration that certain suits may not be brought in federal court does not, in itself, constrain the exercise of Congress' *substantive* lawmaking power. Congress remains empowered to subject the States to regulatory control when States embark on activities properly subject to federal control. The rights that Congress creates against States can presumptively be vindicated within the judicial systems of the several States; nothing in the Eleventh Amendment or *Hans* would prevent that vindication.[20] In short, a clear understanding of *Hans* and the Eleventh Amendment as firm jurisdictional limitations on federal courts, stripped of the baggage of sovereign immunity, serves to relieve the tension in the Court's Eleventh Amendment jurisprudence.[21]

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[19] The sole exception, of course, is when Congress is acting in express furtherance of a special power granted by a subsequent Amendment, such as Section 5 of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-56 (1976). Even here, the Court has required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Atascadero*, 105 S. Ct. at 3146, *quoting Quern v. Jordan*, 440 U.S. 332, 342 (1979).

[20] In some instances, of course, principles of federalism and state sovereignty may themselves limit Congress' power. *See generally Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985); *see also Coyle v. Oklahoma*, 221 U.S. 559 (1911).

[21] *Compare* Justice Marshall's opinion for a unanimous Court in *Kentucky v. Graham*, 105 S. Ct. at 3107 ("absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court") *with* the sharp division of the Justices in *Atascadero*.

C. *Parden* Exemplifies The Error Of Interpreting The Eleventh Amendment As Merely An Incorporation Of The Sovereign Immunity Doctrine.

In this Court's cases, the only significant departure from the understanding that the Eleventh Amendment imposes a jurisdictional limitation on the federal courts is *Parden v. Terminal Railway*, 377 U.S. 184 (1964). *Parden* rests upon an apparent confusion between that jurisdictional limitation and the substantive doctrine of sovereign immunity.

In *Parden*, the Court began by correctly identifying the two issues presented by that case, distinguishing between 1) the question whether Congress intended to subject the States to regulation under the Federal Employers' Liability Act ("FELA"); and 2) the question whether a FELA suit could be prosecuted against a State in federal court. But the Court posed and answered those questions in the wrong order. The Court determined *first* that Congress' broad purposes in enacting FELA contemplated bringing a State, as an employer, within the scope of the Act. Only after determining that the State was indeed subject to the Act did the Court determine whether a suit against a State under the Act could be entertained in federal court. This schedule for deciding the issues tends to reverse the ordinary agenda for decision in the federal courts, which requires a federal court to pass upon jurisdictional questions before reaching any issues on the merits. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3522 (2d ed. 1984); *cf.* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). *Parden*'s ordering of the questions may be appropriate if *Hans* described only an affirmative "sovereign immunity" defense on the merits to a federal claim; but it is fundamentally wrong in light of *Hans*' statement of a jurisdictional rule.

Parden's failure clearly to distinguish between the common law doctrine of sovereign immunity and the Eleventh

Amendment's jurisdictional limit on suits against the States clouded the Court's analysis in at least three ways. *First*, this failure led the Court to rely largely on notions of constructive waiver, implied consent, and distinctions between governmental and proprietary activities, concepts which have been fixtures of state law immunity jurisprudence for many years.[22] Because the Court in *Parden* focused on the issue of sovereign immunity, rather than jurisdiction, these doctrines were not out of place. But fictions that may permissibly characterize common law adjudication have little place in federal jurisdictional jurisprudence.

Second, because the Court in *Parden* saw the issue as one of sovereign immunity, it found in the Supremacy Clause the logical answer to the difficulty posed by sovereign immunity in a federal question case: "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192. In short, sovereign immunity could not be a defense to a federal claim. Thus, after finding the States within the intended scope of FELA, the Court had little difficulty holding that the State was likewise subject to suit in federal court under that Act. It was the *Parden* Court's failure to heed the jurisdictional limitation at the core of the Eleventh Amendment that led it to conclude that because Congress may subject a State to regulation in the exercise of its Commerce Clause powers, Congress is also empowered to subject the State to a private suit in federal court.[23]

[22] State courts, construing state common law doctrines of immunity, have felt impelled to riddle sovereign immunity with exceptions so as to give effect to the principle that a person who is wronged will have a remedy. *See generally* 3 K. Davis, *Administrative Law Treatise* ch. 25 (1958). This judicially felt need to afford an injured party a remedy, which has apparently motivated many state legislatures to develop exceptions to the immunity rule (*see* K. Davis, *Administrative Law of the Seventies* § 25.00-1, at 555 (1976)), should have no bearing in the Eleventh Amendment context. Not only are the federal courts without authority to expand or contract the constitutional limits on their jurisdiction, but the elimination of a remedy in federal court does not deprive any litigant of all remedies whatsoever because the state courts remain as forums for their claims.

Third, having concluded that States fell within the logical scope of FELA, the Court in *Parden* mistakenly equated the failure to permit federal court FELA suits against the State with the congressional creation of a "right without a remedy." 377 U.S. at 190. As we have noted, this view fails to appreciate the role that state courts may play in the adjudication of federal rights. *See Atascadero*, 105 S. Ct. at 3146 n.2. Assuming, *arguendo*—consistent with *Parden's* broad view of the surrender of substantive state sovereignty inherent in the Supremacy Clause—that Congress intended to subject the States to liability, it should have been apparent that the state courts were the appropriate forum to effectuate that intent. Thus, state employees would not have been left without a remedy.

It is thus clear that the reasoning of *Parden*—at least its jurisdictional, as opposed to its substantive law, reasoning—is thoroughly inconsistent with the jurisdictional nature of the Eleventh Amendment, and with the more recent cases establishing a strict standard for determining state waiver. *See Atascadero*, 105 S. Ct. at 3147; *Pennhurst*, 465 U.S. at 99; *Florida Dept. of Health v. Florida Nursing Home Assn.*, 450 U.S. 147, 150 (1981) (*per curiam*). Those more recent cases should be followed here.

[23] This expansive view of congressional power to override the resistance of the State to suit was, as pointed out above, implicit in *Parden*. But *Parden* itself was internally inconsistent. For if Congress possesses the constitutional power to subject a State to private suit in federal court on a federal claim, one hardly needs a fictive notion of "consent" to justify the exercise of that power. As shown below, *Parden* correctly discerned the need for consent; but it incorrectly believed that Congress has the power to subject the States to federal court suit at its whim.

D. This Case Must Be Dismissed For Want Of Jurisdiction.

Appreciation of the jurisdictional nature of the Eleventh Amendment clarifies several of the issues raised by the various opinions below. *First*, Congress' plenary legislative power over maritime matters does not affect the disposition of this case in any way. Congress does not have the power to expand the jurisdiction of the federal courts beyond that granted in Article III. The fact that this case arises from the exercise of Congress' admiralty power is thus irrelevant. Congress has the power to subject a State to suit in federal court, and thereby override the jurisdictional prohibition on suits by individuals against the State, only when acting pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment, which has been held by necessary implication to have repealed the jurisdictional limitations of the Eleventh Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). By contrast, the jurisdictional bar of the Eleventh Amendment applies with full force to actions in admiralty, which was part of the Constitution at the time of ratification. *See Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *Ex Parte State of New York, No. 1*, 256 U.S. 490, 498-99 (1921). Congress' admiralty power is "plenary" in the same sense as is the commerce power, but it does not authorize Congress to override a constitutional limitation on federal court jurisdiction.

Second, because a federal court must address issues going to its jurisdiction before reaching the merits of a case, the issue whether the federal district court can entertain petitioner's claim must be resolved prior to any analysis of congressional intent to subject States to Jones Act liability. It is well settled that should a court find itself without jurisdiction, it is precluded from passing upon any question going to the merits, whether of law or fact. *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Whether Congress intended to make States

liable to Jones Act suits has no bearing on the jurisdictional issue.[24]

Because the Eleventh Amendment deprived the district court of jurisdiction to hear petitioner's suit against the State of Texas, and because the question of jurisdiction is a threshold issue, this action must be dismissed.

II. THE STATE OF TEXAS HAS NOT CONSENTED TO JONES ACT SUIT IN THE FEDERAL COURTS, AND THE "CONSTRUCTIVE CONSENT" DOCTRINE APPLIED IN *PARDEN* SHOULD NOT BE EXTENDED TO THIS CASE.

It has long been held that despite the jurisdictional limitation of the Eleventh Amendment, a State may consent to suit in a federal court, a principle with which *amici* do not disagree. The very notion that a State's consent to suit can confer jurisdiction on a federal court where it otherwise would not exist may seem somewhat anomalous at first glance. *See Employees*, 411 U.S. at 294 n.10 (Marshall, J., concurring). The apparent anomaly disappears, however, when one considers that the rule itself arises from the understanding that the federal courts possess only the judicial power that was originally granted them by the States and that the unwarranted expansion of federal jurisdiction encroaches on those powers that have been reserved to the States. For this reason, the courts have recognized consent by the State itself to suit as an exception to a strict application of the principle of nonwaivable limits on federal jurisdiction. *Ibid.*

Consent to jurisdiction, however, is far different from the concept of implied waiver used in *Parden*. Because

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[24] *Cf. Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 289 (1959) (Frankfurter, J., dissenting) (on the grounds that the Jones Act suit against the State was barred by the Eleventh Amendment and the Court should therefore have declined to reach the substantive issues).

Parden mistakenly equated the question of congressional intention *to regulate* the States with the jurisdictional inquiry, it articulated a doctrine of waiver that would hold a State subject to suit in federal court any time that it was subject to federal legislation. This is error, for the issues are distinct. By operating a ferry, the State of Texas may have engaged in an activity subject to federal control, and thereby subjected itself to federal *regulation*. But this activity did not amount to actual consent to suit in federal court.[25] Given the expansive scope of federal regulatory power, if a State may be held to consent to federal court jurisdiction by simply "enter-[ing] into activities subject to congressional regulation" (*Parden*, 377 U.S. at 196), then "consent" is not a meaningful reflection of the will of the State, but instead merely the manifestation of congressional power and intent.

"Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . ." (*Edelman v. Jordan*, 415 U.S. at 673), and it does not comport with our understanding of the effect of jurisdictional limitations on federal courts. In this context, meaningful consent to waive the jurisdictional protections of the Eleventh Amendment should reflect *the State's* voluntary and knowing decision to allow itself to be held subject to suit in the federal courts. A jurisdictional constraint founded in the Constitution limits not only the federal judicial power but also Congress' ability to expand that power. It is a protection given for the benefit of the State, and thus although the State may consent, that consent should, under the constitutional plan, be a reflection of the State's will, and not of congressional overreaching.

The decision to allow federal court suit may be initiated by the State itself through either a general or

[25] *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 468 (1945).

specific statute granting consent to such suit. In some circumstances, state consent may be exchanged voluntarily for some direct federal benefit granted to a State by the federal government. At a minimum, however, for consent to be meaningful in the context of a *quid pro quo* arrangement between a State and the federal government, the terms and conditions of the exchange—the precise benefit being given and the breadth of the consent granted—must be clearly described before the deal is struck.[27] In short, unless the bar of the Eleventh Amendment is held to be a dead letter with respect to all federal law claims, state consent to suit cannot be as broad as the doctrine suggested by *Parden*, but must instead be the reflection of an actual decision *by the State* to submit to the jurisdiction of the federal courts.

In deciding whether a State has consented to federal court suit, this Court, both before and after *Parden*, has repeatedly held that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. at 673, *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). *See also Kentucky v. Graham*, 105 S. Ct. at 3106 n.14; *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944); *Smith v. Reeves*, 178 U.S. 436, 441 (1900). The Court has ruled that active state participation in a program of federal assistance for state operation of a system of public aid is not sufficient to establish consent (*Edelman v. Jordan*, 415 U.S. at 673); that the State's explicit agreement to abide by federal law as a condition for participation in a federal program is not a waiver (*Florida Dept. of Health*, 450 U.S. at 150); and that a statute that expressly grants a general consent to suit

[26] No deal has been struck under the Jones Act, for none of the formalities of exchange is present. Congress did not ask for, and the State of Texas did not give, its express consent to suit.

will not be construed as a waiver of objection to suit in *federal* court (*Smith v. Reeves*, 178 U.S. at 441). Therefore, it is plain that where, as here, the State has done nothing at all to indicate acquiescence to suit in federal court except to engage in activities "subject to federal regulation," there has been no meaningful consent to jurisdiction.

Parden's broad implied waiver doctrine is out of step with this Court's other decisions and with fundamental constitutional principles. Because the State of Texas has not unequivocally expressed its intention to subject itself to suit in federal court, the district court had no jurisdiction in this case.

Thus, the Court should not address the substantive question whether the Jones Act applies to petitioner. Given the absence of federal jurisdiction, it is neither advisable nor proper for the Court to reach the substantive issues arguably presented by this case. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); *see also Petty*, 359 U.S. at 289 (Frankfurter, J., dissenting). Those issues should first be considered by the courts of the State, which share statutory jurisdiction with the federal courts over Jones Act suits. *See Lauritzen v. Larsen*, 345 U.S. 571, 574 n.4 (1953); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 43 (1943); *Engel v. Davenport*, 271 U.S. 33, 37-38 (1926).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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